# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 115

KERN-LIMERICK, INC., AND UNITED STATES OF AMERICA, APPELLANTS

*v.*

CARL F. PARKER, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS*

## BRIEF FOR THE APPELLANTS

### OPINIONS BELOW

The Pulaski County Chancery Court wrote no opinion. The opinion of the Supreme Court of the State of Arkansas (R. 49–57) is reported at 254 S. W. 2d 454.

### JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on January 12, 1953. (R. 57.) A petition for rehearing, seasonably filed by appellants Kern-Limerick, Inc., and the United States on January 29, 1953 (R. 58–60),

was entertained and denied on February 23, 1953 (R. 60). The petition for allowance of an appeal was filed on May 21, 1953 (R. 60), and was allowed on the same date (R. 61). This Court, by order of October 12, 1953 (R. 64), noted probable jurisdiction. The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Sections 1257 (2) and 2101 (c).

## QUESTIONS PRESENTED

1. Whether the Arkansas gross receipts tax statute can constitutionally be applicable to a sale by a vendor of equipment used in the performance of a cost-plus-fixed-fee contract with the United States, where the purchase was in the name of the United States and not of the contractor, title to the equipment passed directly from the vendor to the United States, and the United States alone was obligated to the vendor for payment of the purchase price.

2. Whether the purchasing arrangement established in the cost-plus contract involved here was authorized by the Armed Services Procurement Act of 1947.

## STATUTES INVOLVED

The pertinent provisions of the Arkansas Gross Receipts Tax Act of 1941 and of the Armed Services Procurement Act of 1947 are set forth in the Appendix, *infra,* pp. 53–69.

## STATEMENT

1. *The litigation.*—This is a suit to recover Arkansas gross receipt taxes paid under protest by Kern-Limerick, Inc., an Arkansas corporation,

with respect to a sale by it of two diesel tractors for use in the construction of the Naval Ammunition Depot at Shumaker, Arkansas.

On December 14, 1950, in the course of the construction of the Shumaker Depot, two Allis-Chalmers HD–5G diesel tractors were purchased from Kern-Limerick, Inc., a dealer in construction machinery and equipment, at a price of $8,573.33 each, a total of $17,146.66. (R. 1, 36.)[1] The State Commissioner of Revenues demanded from Kern-Limerick, Inc., a gross receipts tax of $342.93 as due on the transaction under the Arkansas Gross Receipts Tax Act of 1941. (R. 1, 36.)

On September 11, 1951, Kern-Limerick, Inc., filed a gross receipts tax return covering the transaction, paid the amount of the tax under protest, and demanded in writing a refund of the tax and a hearing to determine whether the transaction was taxable. (R. 1, 36.) The hearing was held on September 24, 1951, and the State Commissioner of Revenues issued an order determining that the sale was taxable. (R. 35.)

On October 22, 1951, Kern-Limerick, Inc., in accordance with state law, petitioned for an appeal from that order to the Chancery Court, Second Division, Pulaski County, Arkansas, alleging that the sale was to the United States and was exempt from taxation under the provisions of the Arkansas Gross Receipts Tax Act of 1941. (R. 1.) It further alleged that imposition of the gross receipts tax upon the sale to

[1] The details of this sale and purchase are described, *infra*, pp. 13–16.

the United States was invalid as repugnant to the Constitution of the United States, and that the Arkansas Gross Receipts Tax Act of 1941, if construed and applied to impose a tax upon the transaction, was invalid under the Constitution of the United States. (R. 2.)

On October 25, 1951, the Commissioner of Revenues for the State of Arkansas filed a response to the petition, denying that the sale was to the United States and alleging that it was made to the contractor constructing the Shumaker Depot under a cost-plus-fixed-fee contract with the United States. (R. 36.) The United States intervened in the suit on April 16, 1952, and adopted and incorporated in its petition in intervention all of the allegations of the petition of Kern-Limerick, Inc. (R. 37.)

After a trial of the issues, the Chancery Court, on April 23, 1952, entered its decree that the sale was to the United States Government and exempt from taxation under the provisions of the Arkansas Gross Receipts Tax Act, ordered a refund of the tax to Kern-Limerick, and allowed the Commissioner of Revenues an appeal to the State Supreme Court. (R. 47–49.)

The Arkansas Supreme Court, two members dissenting and one member not participating, held, in an opinion filed May 21, 1953, that the sale was to the contractor, not to the United States, and was taxable. The court also held that under the Armed Services Procurement Act of 1947 the Navy Department was without authority to employ a cost-plus contractor to act for it in purchasing equipment. (R. 49–57.)

2. *The cost-plus-fixed-fee contract with the Navy.*—On September 1, 1950, the United States, through the Department of the Navy, negotiated and entered into a cost-plus-fixed fee contract, designated NOy–23197, with a joint venture composed of Winston Bros. Company, C. F. Haglin and Sons, Inc., the Missouri Valley Bridge & Iron Company, and Sollitt Construction Company, Inc. (hereinafter called the "Navy contractor" or "WHMS"), for the construction and completion of the Naval Ammunition Depot at Shumaker, Arkansas. (R. 3.) Article 40 of the contract (R. 32) recites that it was entered into under the authority of Sections 2 (c) (10) and 4 (b) of the Armed Services Procurement Act of 1947. The contract was in effect during the transaction involved in the present case. (R. 38.) For the convenience of the Court, and because the contract reveals the nature of the relationship between the contractor and the Government, we summarize its main provisions:

Article 1 of the contract lists fifteen general projects to be carried out by the contractor under the contract, and directs the contractor to organize his forces and take the necessary steps to commence operations. The projects include the completion of three partially constructed production lines, the construction of certain specified buildings, the installation of railroad tracks, switches, and sidings, the extension of utilities, and the procurement and installation of production equipment. The total cost of the projects is estimated at $30,800,000, exclusive of the contractor's fixed fee of $580,000. (R. 5.)

Article 2 provides that the projects be completed in conformance with plans and specifications supplied by the Government. Any plans and specifications necessary to supplement those provided by the Government are to be furnished by the contractor, subject to the approval of the Contracting Officer.[2] (R. 6.) A procedure is provided in Article 3 by which the contractor may obtain an adjustment of his fixed fee if changes in the projects are ordered which cause a material increase or decrease in the amount or character of the work. (R. 6.)

Provision is made in Article 4 for the designation of an officer of the Civil Engineer Corps, United States Navy, to serve as Officer-in-Charge of Construction. In this capacity, under the direction of the Contracting Officer, he is to assume complete charge on behalf of the Government of the work in the field. (R. 7.)

Article 5 imposes certain requirements with respect to the contractor's organization. It directs that a project manager be appointed to assume charge on behalf of the contractor of all work under the contract. The contractor is to submit a chart showing all of his personnel (other than laborers) to be assigned to the work, together with a statement of their duties and rates of pay, and the administrative procedures proposed to be used in accomplishing the work. No key employee is to be removed during the progress of the work except for cogent reasons and after consultation with the Navy Officer-in-

[2] The Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 5.)

Charge. The contractor agrees to cooperate fully with any other contractor or Government labor that may be supplied by the Government. (R. 7.) Article 6 provides that all services and labor necessary to accomplish the work are to be supplied by the contractor, unless furnished by the Government. The Officer-in-Charge must approve the employment of all persons proposed for certain key jobs, and the assignment of all personnel to the contractor's guard force. He may require the dismissal of any employee deemed by him to be careless, incompetent, insubordinate or otherwise objectionable. (R. 8.)

Article 7 requires the contractor to supply all plant and equipment not purchased by the Government under the provisions of Article 8 or otherwise furnished by it to the contractor. No equipment costing more than $200, or renting for more than $100 per month, may be supplied by the contractor without prior approval in writing from the Contracting Officer. Rental compensation based upon cost is payable to the contractor with respect to equipment owned by him, computed in the manner specified in the article. In computing rental compensation, the cost of the equipment includes insurance premiums (if allowable), depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 8–9.) In Article 12, the contractor is requested not to insure equipment or materials furnished by the Government, the Government assuming risk of loss or damage to such property. (R. 15.)

Article 8 provides that title to plant and equipment purchased for the Government passes di-

rectly to it from the vendor, and by Article 7 final disposition of all Government plant and equipment is placed under the direction of the Contracting Officer. (R. 9, 10.) Article 8 also provides, in part (R. 10):

> (a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.
>
> (b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever

of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

(c) No purchase in excess of $500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of $2,500 for any one purchase without obtaining such prior approval.

In Article 10, the Government agrees to compensate the contractor for the sum of the net cost paid by him in performance of the contract, plus the fixed fee, the general intent of the parties being that the contractor will be compensated for all allowable out-of-pocket advances and expenditures made incident to the contract. Seventeen classes of allowable advances or expenditures are listed. (R. 11–14.) Article 11 provides the procedure by which the contractor is to request reimbursement. Weekly applications are authorized. (R. 14.) Article 9 requires the contractor to procure all necessary licenses (R. 11), and he is required by Article 13 to obtain such liability insurance as the Contracting Officer may direct (R. 15). Article 14 provides that the Contracting Officer be notified immediately of any claims

against the contractor which would constitute a reimbursable cost under the contract. It further requires the contractor to cooperate with the Government in the defense of such claims. (R. 16.)

Article 15 requires all workmanship, equipment, materials, and articles used in performing work to be of the most suitable grade of their respective kinds for the purpose, unless otherwise authorized by the Contracting Officer. (R. 16.) Article 16 provides that all materials and workmanship are subject to examination by Government inspectors at any and all times. The contractor is directed to furnish all necessary facilities for such inspection. Unsatisfactory material or workmanship may be rejected, and must be satisfactorily replaced or corrected. Wherever justifiable, material to be incorporated in the work shall be inspected at the place of production, manufacture, or shipment. (R. 17.)

Article 17 requires the contractor to keep adequate records bearing upon costs and expenses, in accordance with the accounting methods prescribed by the Bureau of Yards and Docks, Navy Department, for cost-plus-fee contracts. The records must be retained for five years following final payment, when, with the approval of the Contracting Officer, they may be discarded. The records shall be available to authorized personnel of the Government at all reasonable times. (R. 18.)

Article 18 provides that the Government may terminate the contract for the fault of the contractor or when the Contracting Officer determines that termination is in the best interests of the Government. The duties of the contractor upon

termination are specified, and provision is made for settlement of all of its claims under the contract. (R. 19–23.) Article 19 provides that the Contracting Officer's decision on any question of fact arising under the contract is final, unless appealed. The contractor may appeal to the Secretary of the Navy, whose decision, after a hearing at which the contractor may present evidence, is final and conclusive. Pending this decision the contractor must proceed with the performance of the contract in accordance with the Contracting Officer's decision. (R. 23–24.)

In Article 20, responsibility is imposed upon the contractor for safeguarding all material classified for security purposes, and reporting any subversive activity of which it becomes aware. (R. 24.) Article 21 forbids the assignment of any interest in the contract, except to a financing institution under specified conditions. (R. 25.) Article 22, relating to rates of wages, provides that the contractor or his subcontractors shall pay wages at least once a week, without any unauthorized deduction, at rates not less than those stated in Exhibit A to the contract. Payment of a lower rate of wages is a ground for termination of the contract. (R. 25–26.) Article 23 provides that no laborer or mechanic employed by the contractor shall be required or permitted to work more than eight hours in one calendar day unless compensated at a rate one and one-half times the basic rate of pay for all hours worked in excess of eight; violations of this provision are punishable by fine. (R. 26–27.) Article 24 forbids the employment of convict labor (R. 27), while Article 25 forbids discrimination against any applicant

for employment because of his race, creed, color, or national origin (R. 27). Article 26 requires the contractor to comply with all rules, regulations and interpretations of the Secretary of Labor relating to attempts to induce a person engaged in the construction of public works to give up any part of the compensation to which he is entitled. (R. 27.)

Article 27 requires the contractor to record, at the direction of the Officer-in-Charge, such labor statistics as are required for transmittal to the Department of Labor. (R. 27.) Article 28 provides that no member or delegate to Congress shall be admitted to any share of the contract, or to any benefit arising from it. (R. 27–28.) The contractor warrants, in Article 29, that no person or agency other than an established agency maintained by the contractor to secure business has been retained on a contingent fee or commission basis to secure the contract; for breach of this warranty the Government may annul the contract or deduct the amount of the commission or fee from the contract price. (R. 28.) Article 30 provides for the use of domestic articles, with certain necessary exceptions, in the performance of the work (R. 28), and Article 31 subjects the contract to the provisions of the Renegotiation Act of 1948, c. 333, 62 Stat. 258, Sec. 3 (R. 29).

Articles 32, 33 and 34 relate to claims for patent infringement arising from the performance of the contract, and mark out the area in which the contractor indemnifies the Government, the situations in which the Government authorizes use of patented articles, and the notice and assistance which the contractor will render the Government in the

event of a claim of patent infringement. (R. 29–30.) Article 35 specifies that failure of the Government to insist upon strict performance of a contract term, or to exercise an option right, shall not be construed as a waiver for the future of any such terms or options. (R. 30–31.)

Article 36 provides that if the contractor is composed of more than one legal entity the property owned by each entity shall be considered the property of the contractor, and each shall be jointly and severally liable for the undertakings of the contractor. (R. 31.)

Article 37 provides that all previous agreements of the parties with respect to the subject matter of the contract are superseded by the terms of this contract. (R. 31.) Article 38 is the standard definition section. (R. 31.)

3. *The transaction with Kern-Limerick, Inc.*— Kern-Limerick, Inc., is an Arkansas corporation with its principal place of business in Little Rock, Arkansas. During the time in question it was engaged in the business of selling construction machinery and equipment. (R. 1, 36.)

The procedure by which the particular transaction here involved was authorized, conducted and consummated, and the instruments required by the United States to be used in connection therewith, have been stipulated, and it is also agreed that the procedures followed in this instance were in accordance with the general procedures provided in the contract of the Navy with WHMS and generally followed in the purchases of supplies and material required for the performance of the cost-plus contract. (R. 38-48.)

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The contractor (WHMS) originated the request for the diesel tractors involved here upon a form designated "Purchase Request" (NavDocks FC–201), which, after being reviewed by various members of the contractor's staff, was transmitted to the Officer-in-Charge of Construction, representing the Contracting Officer of the Navy. (R. 38–39.) The latter reviewed and approved the request. (R. 39.) Had the request been disapproved by the Navy, the equipment would not have been purchased. (R. 39.) After approval by the Officer-in-Charge, the contractor prepared and mailed to possible vendors (R. 40) a "Request for Bid" (R. 46A)[3] which recited "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered * * *." One of the conditions was as follows (R. 46B):

> 3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

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[3] This "Request for Bid" was in the name of the Bureau of Yards and Docks, Navy Department, "by" the contractor (WHMS) as "purchasing agent." (R. 46A.)

The bids submitted were opened by and read in the presence of representatives of the contractor and two representatives of the Officer-in-Charge, and in this case the bid of appellant Kern-Limerick, Inc., was recommended by these representatives as the lowest acceptable bid. (R. 40.) A purchase order (Nav Docks FC–204, R. 2A) was prepared accordingly. The order contained a provision identical with the condition numbered 3, quoted above. (R. 2B, 41.) At this point it was necessary that there be funds appropriated and set aside for the specific purchase order. If such funds had not been appropriated and set aside, then the contractor would not have proceeded any further until funds had been appropriated and set aside (R. 41). The Officer-in-Charge approved the order by signing his name thereto, and the contractor also signed as Purchasing Agent for the United States (R. 2A, 41–42). It was then forwarded to Kern-Limerick, Inc.

Kern-Limerick, Inc., shipped the equipment to the Officer-in-Charge, in care of the contractor (WHMS) at Shumaker, Arkansas, where it was received, inspected, and approved by a Navy Inspector and a representative of the contractor, both being required to be present. (R. 42.) As noted above (*supra,* p. 14) the Purchase Order provided that title was to pass from Kern-Limerick, Inc., directly to the United States, without passing through WHMS, and also that the credit of the United States was alone pledged for payment of the purchase price. All this was in accord with Article 8 of the Navy's contract with WHMS (see *supra,* pp. 8–9).

Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of Purchase Order condition number 3 quoted above at p. 14. (R. 44.) The contractor paid it and was reimbursed by the Government. (R. 44, 45.)

### SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors is set out in the record (p. 62) as follows:

> The Supreme Court of the State of Arkansas erred:
>
> 1. In holding that under the pertinent contract between the United States, Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas), and the purchase orders issued thereunder to the complainant-appellee, the complainant-appellee made sales to that contractor rather than to the United States.
>
> 2. In holding that the sales made by the complainant-appellee are validly taxable under the Arkansas Gross Receipts Tax Act of 1941, Act No. 386 of the Acts of Arkansas for 1941 (Arkansas Statutes, 1947, sections 84–1901 to 84–1919).
>
> 3. In holding that the sales made by the complainant-appellee were not sales to the United States and are not immune from taxation by the State of Arkansas under the Constitution of the United States.

4. In holding that the United States (through the Navy Department) was without the authority or power to make the purchases in question from the complainant-appellee in the form in which those purchases were made, and in holding that the contract between the United States and the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas, was a delegation of power prohibited by the Armed Services Procurement Act of 1947.

5. In reviewing and overruling the determinations of the proper officials of the Navy Department that the contract with the contractor and the purchase agreements with complainant-appellee were proper under the Armed Services Procurement Act.

6. In holding that the Arkansas Gross Receipts Tax Act of 1941, as applied to the sales involved here, is not repugnant to, and violative of, the Constitution of the United States.

## SUMMARY OF ARGUMENT

### I

The Arkansas gross receipts tax statute designates the vendor as the "taxpayer", and builds its collection machinery around him. However, it is mandatory upon the vendor to collect the tax from the purchaser, and the provisions of the act clearly indicate on their face that the vendor is intended to serve merely as a tax collector, and that the legal incidence of the tax is upon the

purchaser. The decisions of the Supreme Court of Arkansas unequivocally hold that the tax is a sales tax laid upon the purchaser and not the vendor. The analogous cases considered by this Court have reached the same result.

## II

It is no longer open to debate that a state may not impose a tax upon the Government itself, or upon its purchases or activities. The fact that the tax is collected through a private person, rather than from the United States, does not destroy the Government's immunity. The Arkansas gross receipts tax statute recognizes these principles by exempting the gross proceeds of sales to the United States.

## III

In holding that the cost-plus contractor (WHMS), and not the United States, was the purchaser here, the Supreme Court of Arkansas rested primarily on the decision of this Court in *Alabama* v. *King & Boozer,* 314 U. S. 1, but it failed to consider the rationale of that decision and to note the significant differences between the two cases.

In *King & Boozer,* the Court held that the major test of whether the Government was the purchaser was whether the Government became obligated to pay the vendor of the property. In order to decide this issue in *King & Boozer,* the Court examined the agreement between the United States and the cost-plus contractor, the purchase order used in consummating the sale, and the course of business followed in making the pur-

chase. On that basis, it was held that the Government never became bound to the vendor. Examination of the same factors in this case indicates the significant differences in the two situations. Here, the Government did become obligated under the express terms of the Purchase Order, the provisions of the arrangement between WHMS and the Navy, and the general course of dealings. Kern-Limerick, Inc. could have sued the United States under the Tucker Act if payment had not been made. Unlike the cost-plus contractor in *King & Boozer,* WHMS was not itself bound to the vendor. It was on these very factors in which the present case differs that the decision in *King & Boozer* turned. Under these circumstances, the rationale of the *King & Boozer* decision, when applied here, points directly to a result opposite to that reached there.

## IV

The contract between the cost-plus contractor (WHMS) and the Government was entered into under the authority of Section 2 (c) (10) of the Armed Forces Procurement Act of 1947, which permits negotiated contracts where advertising would be impracticable (Appendix, *infra,* pp. 62–63). With respect to purchases made under that provision, the Secretary of the Navy is empowered, subject to restrictions not here pertinent, to make contracts of any type which in his opinion would promote the interests of the Government. He may delegate his powers to officials of the Navy, and the delegate's findings and determinations are final.

The cost-plus contract was entered into on behalf of the Government by the Chief of the Bureau of Yards and Docks, Department of the Navy, who was duly authorized to act in the capacity of Contracting Officer. The contract recited that all necessary determinations had been made. No express authority was necessary to appoint WHMS the Navy's purchasing agent, to the limited extent that it was. Absent Congressional restriction, the Government may, incident to the general right of sovereignty, enter into any contract appropriate to the exercise of its powers, and enjoys unrestricted power to determine the terms and conditions upon which it will make needed purchases.

The particular purchase order used in the transaction with Kern-Limerick, Inc., was also consistent with the Procurement Act. It was approved for the Contracting Officer by a Navy officer designated in the contract to serve under his direction as Officer-in-Charge on behalf of the Government. The chain of authority, therefore, is in complete conformance with the requirements of the Act, which requires no more than that a duly authorized official of the Navy pass upon Navy purchases. No wrongful delegation of power took place. The power granted the Secretary of the Navy to enter into contracts was exercised by an authorized Contracting Officer of the Navy and his designated representative. The activities of WHMS in soliciting the order, administering the necessary papers, and advancing

payment merely complemented and did not infringe upon this power.[4]

## ARGUMENT

### I

### THE ARKANSAS GROSS RECEIPTS TAX IS A SALES TAX IMPOSED UPON THE PURCHASER

While the appellee has not in terms conceded that the State gross receipts tax is a sales tax on the purchaser, he has not argued to the contrary in the courts below. At any rate, it is clear from the terms of the Gross Receipts Tax Act itself, the decisions of the Supreme Court of Arkansas, and the decisions of this Court, that the tax is imposed upon the buyer and not the seller, who acts simply as the collecting agent for the State.

1. *The Statute.* Act 386 of the Acts of Arkansas of 1941 (7 Arkansas Statutes Annotated (1947 Official ed.), Sec. 84–1902 *et seq.*) imposes a 2 percent gross receipts tax on sales within the State.[5] (See Appendix, *infra,* pp. 53 *ff.*) The collection machinery of the Act is built

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[4] We also suggest that neither appellee nor the State of Arkansas has standing to challenge the validity of either the cost-plus contract with WHMS or the purchase contract with Kern-Limerick, Inc.

[5] "Sale" is defined as "the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished." Sec. 84–1902 (c), Appendix, *infra,* p. 53. Sales to contractors are specifically made taxable by Sec. 84–1903 (e), Appendix, *infra,* p. 54.

around the vendor, who is required to collect the tax from the purchaser and remit payment to the Commissioner of Revenue. (Sec. 84–1908, Appendix, *infra,* p. 56.) By definition, any person liable to remit a tax is a taxpayer (Sec. 84–1902 (e), Appendix, *infra,* p. 53) and all "taxpayers" are required to keep records and file monthly returns showing gross receipts from sales. (Sec. 84–1906, 84–1907, Appendix, *infra,* pp. 54–56.) Failure of a vendor "taxpayer" to comply with any provision of the Act is ground for revocation of his permit (Sec. 84–1913, Appendix, *infra,* pp. 59–61), without which he may not transact business within the State under penalty of fine and imprisonment. (Sec. 84–1919, Appendix, *infra,* p. 62.)

That the vendor, although designated the "taxpayer", is intended merely to serve as tax collector is fully demonstrated by the provisions of the Act. Section 84–1908 (Appendix, *infra,* p. 56) expressly provides that the seller *"shall* collect the tax levied hereby from the purchaser." [Italics supplied.] If the tax is remitted within five days of the time set for the filing of the return, only 98 per cent of the amount of tax due need be paid. Section 84–1915 (Appendix, *infra,* p. 61), which authorizes the discount, specifically provides that—

> This discount is allowed the seller * * * to remunerate him for keeping Sales Tax Records, filing reports, collecting the tax, and remitting it when due as required by this act.

Cf. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 53. Section 84–1909 permits any person doing business upon a credit basis to apply to the Commissioner of Revenues for permission to prepare his returns on the basis of cash actually received; this is a provision presumably designed to eliminate tax liability when the seller cannot in fact collect from the buyer. And, although it has never been invoked, authority is given the Commissioner to issue tokens in one and five mill denominations to enable the purchaser to pay the exact amount of tax collected from him. Sec. 84–1908 (Appendix, *infra,* p. 56).

The statute, in short, calls the seller the "taxpayer" but its provisions place the legal incidence of the tax inescapably upon the purchaser.

2. *The Arkansas Decisions.* The decisions of the Supreme Court of Arkansas unequivocally hold that the tax is a sales tax laid upon the purchaser and not the vendor.

In *Cook, Commissioner of Revenues* v. *Sears-Roebuck & Co.,* 212 Ark. 308, the court said that the vendor (p. 316) —

> is a "taxpayer" only in the sense that it collects and remits the tax and makes a report thereof; but is not a "taxpayer" in the sense of being the initial payer of the tax. The burden—under § 7 of the Act—falls on the party who purchases the merchandise * * *.

And in *Wiseman* v. *Phillips,* 191 Ark. 63, which held constitutional the substantially similar pred-

ecessor sales tax Act[6] the Arkansas court concluded (p. 73):

> The merchant is not taxed. He is a tax collector. The tax is required of the purchaser, and the merchant must collect and account for it.

This quotation was cited with approval in *Hardin, Commissioner of Revenues* v. *Vestal,* 204 Ark. 492, 495, which construed the Act under which the present tax was levied. To the same effect is *Mann* v. *McCarroll, Commr. of Rev.,* 198 Ark. 628, which refers (p. 637) to the vendor as the "agent of the state for * * * collection".

In *Arkansas Power & Light Co.* v. *Roth,* 193 Ark. 1015, the purchaser urged that his liability to the Commissioner of Revenues for payment of the tax obviated any obligation to make payment to the vendor, and that consequently the vendor could not foreclose a chattel mortgage given by the purchaser to secure payment for the vendor's services. The court acknowledged the purchaser's liability to the Commissioner of Revenues, but held that an implied-in-law obligation existed upon him to make payment to the vendor.

The Arkansas court has thus been consistent and emphatic in holding that, despite the formal terminology of the Act, the tax is a sales tax imposed upon the purchaser.

3. *The Decisions of this Court.* This Court has considered several comparable state and local taxes and has ruled in each case that they were taxes upon the buyer although collected from the seller. In *Alabama* v. *King & Boozer,* 314 U. S. 1,

[6] Act 233, Acts of Arkansas 1935.

7, the closely analogous Alabama tax was held to be laid on the purchaser, although as in this case "in terms * * * the tax is laid on the seller, who is denominated the 'taxpayer' ". The same ruling was made, in somewhat different contexts, in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 43; *Colorado Bank* v. *Bedford*, 310 U. S. 41, 51; and *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 99; cf. *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 233.

Even if the State court had decided otherwise, this Court would be free to determine, for the purpose of rights under the Federal Constitution and statutes, that the legal incidence and impact of the tax was upon the purchaser, rather than the seller. *N. J. Ins. Co.* v. *Div. of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 84; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443.[7] As we have pointed out (*supra*, pp. 21–23), the statute in terms places on the seller the legal duty of collecting the tax from the purchaser. It contains provisions, relating both to the seller's liability and to the collection

[7] See, also, *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 476; *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 119; *Senior* v. *Braden*, 295 U. S. 422, 429; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Storaasli* v. *Minnesota*, 283 U. S. 57, 62; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 509–510; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362–363; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 227.

machinery, which demonstrate from the face of the statute that the tax is on the purchaser.

## II

### THE UNITED STATES IN ITS PURCHASES IS IMMUNE FROM A SALES TAX UPON THE PURCHASER

It was pointed out in *United States* v. *Allegheny County,* 322 U. S. 174, 176–177, that since *McCulloch* v. *Maryland,* 4 Wheat. 316, no decision of this Court has questioned that, in the absence of congressional consent, the Government's activities and property are immune from taxation by the states and their political subdivisions.* *United States* v. *Allegheny County, supra, Mayo* v. *United States,* 319 U. S. 441, and *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, 561–562, 566–567, indicate the undiminished vigor of this principle, from which it follows that the tax in controversy cannot stand if, as we urge, it is actually levied upon the United States.

The fact that the tax is collected from a private person, rather than from the United States, does not destroy the federal immunity where the taxes are actually levied on the Government itself. Of the many cases holding the Government immune from state taxation, only two (*Clallam County* v. *United States,* 263 U. S. 341, and *Mayo* v. *United States, supra*) involved attempts to collect taxes or fees directly from the United States. In the

* Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 175–177, but, as pointed out therein, they have no weight as authority.

other cases, the local authority proceeded for collection against a private person.

For instance, in *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some thirteen years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchaser to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens. See also, e. g., *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89; *Maricopa County* v. *Valley Bank,* 318 U. S. 357; *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, 561–562, 566–567.[9] Even though the state proceeds solely against the private person, it is the Government or its property which is in effect being taxed. In all of these situations the Government, as the real party in interest, is subject to the same administrative and fiscal burdens as though the tax were collected directly from the Treasury.[10]

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[9] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott,* 16 Wall. 603; *Railway Co.* v. *McShane,* 22 Wall. 444; *Colorado Co.* v. *Commissioners,* 95 U. S. 259; *Sargent* v. *Herrick,* 221 U. S. 404; *Hussman* v. *Durham,* 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600.

[10] In other types of cases, the Court has also recognized (*Colorado Bank* v. *Bedford,* 310 U. S. 41, 52) that "The person liable for the tax, primarily, cannot always be said to be

Those cases which have allowed state taxation of private contractors closely associated with the United States (*James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495) have not impinged upon the immunity of the Government itself. All involve taxes upon the contractor's own advantages from his contract by way of receipts, profits or beneficial use of property, rather than an impost directly on the Government or its own activities.

*James* v. *Dravo Contracting Co., supra* concerned a tax laid on the Government contractor's gross receipts and there was no claim that the tax was imposed either on the Government's property, on the United States itself, or on its transactions. Similarly, the taxes in *Alabama* v. *King & Boozer, supra,* and *Curry* v. *United States, supra,* were sales and use taxes held to be imposed on purchases of materials by a cost-plus contractor. As in *Dravo, supra,* the taxes reached only the contractor's purchases and use of the property, not the Government; "the fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor." *United*

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the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

*States* v. *Allegheny County*, 322 U. S. 174, 186.[11] Indeed, as will be more fully discussed in the next section of this brief, the rationale of the *King & Boozer* decision assumes that a tax laid on the Government would be invalid. See pp. 30 *ff*, *infra*. *Esso Standard Oil Co.* v. *Evans*, *supra*, decided at the last Term, was also a case in which the Court held the state tax to be imposed on the activities of the Government's contractor and not on the Government or its property (345 U. S. 495, 499–500, 501).

In all of these cases, "the exactions directly affected persons who were acting for themselves and not for the United States." *Mayo* v. *United States*, 319 U. S. 441, 447. What was denied was "immunity for the contractor's own property, profits, or purchases." *United States* v. *Allegheny County*, 322 U. S. 174, 186. The tax or regulation was imposed on the contractor as part of *his* obligation of citizenship, not upon the United States, and the "Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government." *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 500. However, no decision of this Court permits a tax

[11] The overruling in *Alabama* v. *King & Boozer*, 314 U. S. 1, 9 (see *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 277), of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Company*, 298 U. S. 393, involving gasoline taxes denominated as "privilege" taxes, has no bearing on the validity of the present tax, since in both cases the legal incidence of the tax was upon the vendor.

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directly upon the United States, and the historical line of authority condemns it.

## III

### THE UNITED STATES WAS THE PURCHASER

The State of Arkansas does not contend that it possesses power to impose a tax whose legal incidence is upon the United States. Nor is it disputed that the legal incidence of the Arkansas gross receipts tax is upon the purchaser. As is shown by the discussion in Parts I and II, *supra*, pp. 21–30, neither issue is open to serious question. It necessarily follows that Arkansas is without power to tax the transaction here in question if the United States was the purchaser of the property from Kern-Limerick, Inc. This conclusion is recognized in the Arkansas statute, Act 386, Section 84–1904 (g) (Appendix, *infra*, p. 54), which specifically exempts from taxation the "[g]ross receipts or gross proceeds derived from sales to the United States Government."

A. The State Supreme Court's holding, in the opinion below, that the United States is not the purchaser rests almost wholly on the court's erroneous reading of *Alabama* v. *King & Boozer*, 314 U. S. 1 (see R. 52).[12] The *King & Boozer* case involved an Alabama 2% tax on the gross retail sales price of tangible personal property.

[12] "In coming to the conclusion that the United States was not, in this instance, the 'purchaser', we base our decision primarily on the opinion in the case of *Alabama* v. *King & Boozer*, 314 U. S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case."

Just as in this case, the tax was laid in terms on the vendor of the property, but the statute required that the tax be added to the sales price and collected from the purchaser. It was held in this Court, in accordance with the Alabama cases, that the legal incidence of the tax was on the purchaser. The issue presented was whether the tax infringed the constitutional immunity of the United States when applied to a sale of lumber on the order of a cost-plus-fixed-fee contractor for use in constructing an army camp for the Government. It was held that the tax as applied was constitutional, since the contractor, and not the Government, was the purchaser upon whom the legal incidence of the tax fell.

In rejecting the Government's argument that the United States was the purchaser, the Court examined the cost-plus contract under which the contractor operated (314 U. S. at 10–11, 13–14), the purchase order under which the particular sale was consummated (314 U. S. at 11–12), and the general course of business followed by the United States, the cost-plus contractor, and the vendor in completing the sale-and-purchase transaction (314 U. S. at 11–12). The main criterion, many times repeated in the short opinion, by which the Court judged whether the United States was the purchaser was: Did the United States become obligated to pay for the supplies, *i. e.*, was the credit of the United States pledged to the vendor (see 314 U. S. at 10, 11, 11–12, 12, 13, 14)? The Court concluded from the cost-plus contract, the purchase order, and the course of business that, despite the extensive control exercised by the Government over purchases, the

credit of the United States was never pledged, and the contractor purchased on its own behalf.

A detailed examination, for this case, of the same three criteria the Court relied on *King & Boozer* (cost-plus contract, purchase order, course of business) will demonstrate that here, unlike the earlier case, the United States was at all times obligated to Kern-Limerick, Inc., the vendor, for the price of the diesel tractors, and was itself the purchaser.

(a) *The purchase order.*—Perhaps most relevant to the question of whether the Government obligated itself to the vendor, is the contract under which the purchase was consummated.[13]

In the purchase order used in the *King & Boozer* case, *supra,* there appeared an express negation of any obligation for the purchase price on the part of the Government. It recited that (314 U. S. 1, 11–12) "This purchase order does not bind, or purport to bind, the United States Government or Government officers." In the face of this express provision, the Court was naturally unable to find that the Government legally obligated itself to pay for the supplies and was the "purchaser" in the transaction.

In the present case, instead of expressly disclaiming liability on the part of the Government, the purchase order specifically provides "This

[13] As was said by the Court in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–422—

> In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price * * *". (R. 2B, 46B.) This assumption of liability on the part of the Government pledges the credit of the United States to the vendor, and provides consideration for the agreement. If Kern-Limerick, Inc. had not been paid it could have maintained a suit against the United States under the Tucker Act (now 28 U. S. C. 1346, 1491), while the vendor in *King & Boozer* could have sued only the cost-plus contractor. This divergency between the provisions of the two purchase orders distinguishes this case from the *King & Boozer* transaction on the very issue fundamental to the decision of that case.

The other provisions of the present purchase contract flow naturally from the assumption of the purchase obligation by the Government. Title to all purchases vests in the Government directly from the vendor.[14] (R. 2B, 46B.) There is no momentary vesting of title in the contractor, as suggested by the Arkansas Supreme Court (R. 54); title never reaches the contractor, and the purchase order expressly so provides. In *King & Boozer,* it was possible under the terms of the arrangement between the Government and the contractor for title to purchases to remain in the contractor for an appreciable period of time. The Government took title (314 U. S. 1, 10, 13–14) "upon delivery at the site of the work or at an approved storage site and upon inspection and

[14] "Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor [*i. e.* WHMS] shall not acquire title to any thereof."

acceptance in writing by the [contractor]." Both title provisions are consistent with their respective contracts, but, because they are designed to implement fundamentally different purchasing concepts, they differ significantly from each other. This difference also serves to sharpen the distinctions between the present case and *King & Boozer.*

Because this was a purchase by the Government, the purchase order incorporates by reference standard contract clauses prescribed by the Secretary of the Navy for inclusion in Government fixed-price supply contracts, as well as prescribed provisions respecting termination of such supply contracts. (R. 2B, 46B.) These provisions would be completely out of place in a contract to which the Government was not a party. Similar standard-form Government clause provisions were not used in the *King & Boozer* case.

Perhaps minor in itself, yet consistent with the other differences in the two purchase orders, is the fact that in the present case goods are directed to be shipped to the Contracting Officer "c/o" (care of) the contractor (R. 2A), whereas in *King & Boozer* the purchase was invoiced to the "Construction Quartermaster '%' (for account of) the contractors". 314 U. S. 1, 12.[15]

The physical appearance of the purchase order used here is also consistent with its provisions

[15] It is not clear whether this provision was standard in invoices presented under the type of purchase orders used in *King & Boozer.* It appears that the usual practice was for the invoices to read "sold to the contractors". 314 U. S. 1, 12, fn. 2. If this is correct, it only serves to heighten the distinction between the two forms.

and its character as a Government contract. The form is supplied by the Navy Department, Bureau of Yards and Docks, the name of which appears at the extreme top, and the form bears the designation "NAVDOCKS–FC–204". (R. 2A.) Moreover, unlike the purchase order in *King & Boozer,* the signature of the Officer-in-Charge, a United States Navy Officer, appears at the bottom, on behalf of the Contracting Officer, who is the Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 2A, 41.) The source of the authority for these two officers to pledge the credit of the United States is discussed fully in the next part of this brief (pp. 47 *ff., infra*).

Also appearing at the bottom of the form is the signature of WHMS as "Purchasing Agent" for the Government. (R. 2A.) The contract provides that the vendor agrees "to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor" in its capacity as purchasing agent, and that the contractor in this capacity "shall handle all payments hereunder on behalf of the Government." (R. 2B.)

In sum, the purchase order which was delivered to Kern-Limerick, Inc., differs significantly from that used in *King & Boozer* in all the respects considered important by this Court to the holding in that case:

(1) Here, the United States is expressly obligated to pay the vendor and the vendor agrees to make claim on the Government; in the earlier case, the United States expressly disclaimed any such obligation.

(2) Here, the cost-plus contractor assumes no obligation to the vendor and handles payment only as the Government's agent; in *King & Boozer,* the contractor was plainly bound in its own right.

(3) Here, title to the purchased property passes directly from the vendor to the Government, without passing through the contractor, while in the other case title could be for a time in the contractor.

(4) In form, this purchase order was from the Navy, by the contractor as its "purchasing agent", and was also signed by an authorized officer of the Navy, while the *King & Boozer* order was from the contractor in its own name and was not signed by any representative of the Government. Similarly, shipment here was to the Navy Officer-in-Charge, care of the contractor, while in the Alabama case shipments were generally to the contractor itself.

(5) The instant purchase order is a Government contract in form and provisions, with standard clauses required of Government contracts; this was not true of the order in *King & Boozer.*

(b) *The cost-plus contract.*—The provisions of the purchase order just discussed (*supra,* pp. 32–36) conform to the terms of the contract between the cost-plus contractor (WHMS) and the Government, and manifest the purchasing arrangements contemplated by that agreement. As would be expected from the differences appearing in the purchase orders used here and in *King & Boozer,* the portions of the cost-plus-fixed-fee contracts relating to purchases also differ significantly in the two cases.

In *King & Boozer,* the Government reserved the right to furnish materials itself at its election (314 U. S. 1, 13), but it was not contended that the transaction in question fell within that provision. Rather, it was urged that the purchase made by the contractor was, in effect, a purchase by the Government because of the wide control exercised by it over the transaction and because title was ultimately to vest in it. Yet, the cost-plus agreement provided that all purchase contracts entered into by the contractor were to be made in the contractor's own name; should not bind or purport to bind the Government; and should provide that they were assignable to the Government (314 U. S. 1, 11, 13). This Court found that these provisions constituted an insurmountable obstacle to a finding that the Government was the person legally obligated to pay for the purchases, and hence a "purchaser" for the purposes of the Alabama taxing statute. 314 U. S. 1, 11, 13–14. It was held that, read together, these provisions plainly contemplated that the Government was not to be bound on the purchase contracts, but was obligated only to reimburse the contractors when the materials purchased were delivered, inspected and accepted at the site. 314 U. S. 1, 11. It was only then that title to the materials vested in the Government. 314 U. S. 1, 10 .

In the present case, we do not urge that mere control over purchases, as such, renders the Government the purchaser of the equipment.[16] The

[16] As outlined in the Statement, *supra* (pp. 7–10), the contract contemplates extensive control over, supervision, and

Government's status as purchaser stems directly from the precise terms of the cost-plus contract, as the purchase of this equipment by the Government was made pursuant to, and in a manner consistent with, provisions of that contract relating to purchases by the Government.

Article 7 (a) of the contract provides (R. 8–9):

> The Contractor shall provide all plant and equipment required for the accomplishment of the work under this contract *except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government* * * *. [Italics supplied.]

Article 8 (*supra*, pp. 8–9) prescribes a procedure for effectuating Government purchases and specifically provides that in connection with such purchases "the Government shall be directly liable to the vendors for the purchase price." (R. 10.) To effectuate procurement of Government-purchased equipment, Article 8 directs the contractor to act as "purchasing agent of the Government." (R. 10.) In this capacity it is to "negotiate and administer all such purchases and * * * advance all payments therefor * * *", subject to the direction of the Officer-in-Charge. (R. 10.) All purchases exceeding $500 require the prior written approval of the Officer-in-Charge.[17] (R. 10.)

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veto of purchases required for completion of the contract. See also *infra*, pp. 40–44.

[17] The contract permits the Officer-in-Charge, in his discretion, to dispense with the requirement of prior written ap-

As for title to the purchased supplies, it is provided in Article 8 (R. 10) that title "shall pass directly from the vendor to the Government without vesting in the Contractor." See also Article 7 (i) to the same effect. (R. 10.)

The distinction between Government-purchased equipment and equipment supplied by the contractor on its own behalf assumes a realistic importance in view of the provisions of the contract relating to rental compensation for equipment owned and supplied by the contractor. For such equipment the contractor may obtain rental compensation based upon cost, under the provisions of Article 7, *supra,* pp. 7, 38. (R. 9.) Includible in cost are insurance premiums, if allowable, depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 9.) Although the contractor is entitled to be compensated for costs relating to equipment supplied by it, it cannot, of course, obtain similar compensation with respect to Government-furnished equipment. In this connection it may be noted that although insurance premiums may be includible in computing rental compensation on contractor-supplied equipment (R. 9), the contractor is specifically requested not to insure Government-furnished equipment (R. 15). With respect to such equipment the Government assumes the risk of loss or damage. (R. 15.)

Here, again, it is plain that the present contract differs in all essential respects from that before the Court in *King & Boozer,* and these differences are important because the Court noted that the

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proval for purchases not in excess of $2,500. (Art. 8 (c), R. 10.)

"soundness" of the Government's contention that it was the purchaser "turns on the terms of the contract and the rights and obligations of the parties under it" (314 U. S. 1, 9):

(1) In the *King & Boozer* case, the contractor was to furnish as principal all supplies not furnished by the Government; the contract contemplated that the contractor was to obligate itself for purchases; and purchases were to be made in its own name and were not to bind the Government. Contrary provisions were included in the present contract, and the contractor is to act only as "purchasing agent" on behalf of the Government, which alone is bound to pay.

(2) In the earlier case, title could vest for some time in the contractor, before the United States accepted the purchased property. Here, the cost-plus contract specifically provides that the contractor shall never have title.

(c) *The course of business.*—The course of business followed in this case [18] was designed to implement the dual objectives of the purchasing provisions of the contract: to affirmatively pledge the credit of the Government to the vendor, and to utilize the skills and capabilities of the contractor in effecting procurement.

The request for the equipment was initiated by an employee of the contractor upon a form provided him by the Navy Department for that purpose.[19] (R. 38–39.) This form, after review by employees of the contractor, was transmitted to the Navy Technical Division, T–100, where it

[18] This is fully described in the Statement, *supra*, pp. 13–16.

[19] The form is designated "Purchase Request" (NavDocks FC–201).

*States* v. *Allegheny County*, 322 U. S. 174, 186.[11] Indeed, as will be more fully discussed in the next section of this brief, the rationale of the *King & Boozer* decision assumes that a tax laid on the Government would be invalid. See pp. 30 *ff*, *infra*. *Esso Standard Oil Co.* v. *Evans*, *supra*, decided at the last Term, was also a case in which the Court held the state tax to be imposed on the activities of the Government's contractor and not on the Government or its property (345 U. S. 495, 499–500, 501).

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[13] As was said by the Court in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–422—

> In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price * * *". (R. 2B, 46B.) This assumption of liability on the part of the Government pledges the credit of the United States to the vendor, and provides consideration for the agreement. If Kern-Limerick, Inc. had not been paid it could have maintained a suit against the United States under the Tucker Act (now 28 U. S. C. 1346, 1491), while the vendor in *King & Boozer* could have sued only the cost-plus contractor. This divergency between the provisions of the two purchase orders distinguishes this case from the *King & Boozer* transaction on the very issue fundamental to the decision of that case.

The other provisions of the present purchase contract flow naturally from the assumption of the purchase obligation by the Government. Title to all purchases vests in the Government directly from the vendor.[14] (R. 2B, 46B.) There is no momentary vesting of title in the contractor, as suggested by the Arkansas Supreme Court (R. 54); title never reaches the contractor, and the purchase order expressly so provides. In *King & Boozer,* it was possible under the terms of the arrangement between the Government and the contractor for title to purchases to remain in the contractor for an appreciable period of time. The Government took title (314 U. S. 1, 10, 13–14) "upon delivery at the site of the work or at an approved storage site and upon inspection and

[14] "Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor [*i. e.* WHMS] shall not acquire title to any thereof."

acceptance in writing by the [contractor]." Both title provisions are consistent with their respective contracts, but, because they are designed to implement fundamentally different purchasing concepts, they differ significantly from each other. This difference also serves to sharpen the distinctions between the present case and *King & Boozer*.

Because this was a purchase by the Government, the purchase order incorporates by reference standard contract clauses prescribed by the Secretary of the Navy for inclusion in Government fixed-price supply contracts, as well as prescribed provisions respecting termination of such supply contracts. (R. 2B, 46B.) These provisions would be completely out of place in a contract to which the Government was not a party. Similar standard-form Government clause provisions were not used in the *King & Boozer* case.

Perhaps minor in itself, yet consistent with the other differences in the two purchase orders, is the fact that in the present case goods are directed to be shipped to the Contracting Officer "c/o" (care of) the contractor (R. 2A), whereas in *King & Boozer* the purchase was invoiced to the "Construction Quartermaster '%' (for account of) the contractors". 314 U. S. 1, 12.[15]

The physical appearance of the purchase order used here is also consistent with its provisions

[15] It is not clear whether this provision was standard in invoices presented under the type of purchase orders used in *King & Boozer*. It appears that the usual practice was for the invoices to read "sold to the contractors". 314 U. S. 1, 12, fn. 2. If this is correct, it only serves to heighten the distinction between the two forms.

and its character as a Government contract. The form is supplied by the Navy Department, Bureau of Yards and Docks, the name of which appears at the extreme top, and the form bears the designation "NAVDOCKS–FC–204". (R. 2A.) Moreover, unlike the purchase order in *King & Boozer,* the signature of the Officer-in-Charge, a United States Navy Officer, appears at the bottom, on behalf of the Contracting Officer, who is the Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 2A, 41.) The source of the authority for these two officers to pledge the credit of the United States is discussed fully in the next part of this brief (pp. 47 *ff., infra*).

Also appearing at the bottom of the form is the signature of WHMS as "Purchasing Agent" for the Government. (R. 2A.) The contract provides that the vendor agrees "to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor" in its capacity as purchasing agent, and that the contractor in this capacity "shall handle all payments hereunder on behalf of the Government." (R. 2B.)

In sum, the purchase order which was delivered to Kern-Limerick, Inc., differs significantly from that used in *King & Boozer* in all the respects considered important by this Court to the holding in that case:

(1) Here, the United States is expressly obligated to pay the vendor and the vendor agrees to make claim on the Government; in the earlier case, the United States expressly disclaimed any such obligation.

(2) Here, the cost-plus contractor assumes no obligation to the vendor and handles payment only as the Government's agent; in *King & Boozer,* the contractor was plainly bound in its own right.

(3) Here, title to the purchased property passes directly from the vendor to the Government, without passing through the contractor, while in the other case title could be for a time in the contractor.

(4) In form, this purchase order was from the Navy, by the contractor as its "purchasing agent", and was also signed by an authorized officer of the Navy, while the *King & Boozer* order was from the contractor in its own name and was not signed by any representative of the Government. Similarly, shipment here was to the Navy Officer-in-Charge, care of the contractor, while in the Alabama case shipments were generally to the contractor itself.

(5) The instant purchase order is a Government contract in form and provisions, with standard clauses required of Government contracts; this was not true of the order in *King & Boozer.*

(b) *The cost-plus contract.*—The provisions of the purchase order just discussed (*supra,* pp. 32–36) conform to the terms of the contract between the cost-plus contractor (WHMS) and the Government, and manifest the purchasing arrangements contemplated by that agreement. As would be expected from the differences appearing in the purchase orders used here and in *King & Boozer,* the portions of the cost-plus-fixed-fee contracts relating to purchases also differ significantly in the two cases.

In *King & Boozer,* the Government reserved the right to furnish materials itself at its election (314 U. S. 1, 13), but it was not contended that the transaction in question fell within that provision. Rather, it was urged that the purchase made by the contractor was, in effect, a purchase by the Government because of the wide control exercised by it over the transaction and because title was ultimately to vest in it. Yet, the cost-plus agreement provided that all purchase contracts entered into by the contractor were to be made in the contractor's own name; should not bind or purport to bind the Government; and should provide that they were assignable to the Government (314 U. S. 1, 11, 13). This Court found that these provisions constituted an insurmountable obstacle to a finding that the Government was the person legally obligated to pay for the purchases, and hence a "purchaser" for the purposes of the Alabama taxing statute. 314 U. S. 1, 11, 13–14. It was held that, read together, these provisions plainly contemplated that the Government was not to be bound on the purchase contracts, but was obligated only to reimburse the contractors when the materials purchased were delivered, inspected and accepted at the site. 314 U. S. 1, 11. It was only then that title to the materials vested in the Government. 314 U. S. 1, 10 .

In the present case, we do not urge that mere control over purchases, as such, renders the Government the purchaser of the equipment.[16] The

[16] As outlined in the Statement, *supra* (pp. 7–10), the contract contemplates extensive control over, supervision, and

Government's status as purchaser stems directly from the precise terms of the cost-plus contract, as the purchase of this equipment by the Government was made pursuant to, and in a manner consistent with, provisions of that contract relating to purchases by the Government.

Article 7 (a) of the contract provides (R. 8–9):

> The Contractor shall provide all plant and equipment required for the accomplishment of the work under this contract *except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government* * * *. [Italics supplied.]

Article 8 (*supra*, pp. 8–9) prescribes a procedure for effectuating Government purchases and specifically provides that in connection with such purchases "the Government shall be directly liable to the vendors for the purchase price." (R. 10.) To effectuate procurement of Government-purchased equipment, Article 8 directs the contractor to act as "purchasing agent of the Government." (R. 10.) In this capacity it is to "negotiate and administer all such purchases and * * * advance all payments therefor * * *", subject to the direction of the Officer-in-Charge. (R. 10.) All purchases exceeding $500 require the prior written approval of the Officer-in-Charge.[17] (R. 10.)

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veto of purchases required for completion of the contract. See also *infra*, pp. 40–44.

[17] The contract permits the Officer-in-Charge, in his discretion, to dispense with the requirement of prior written ap-

As for title to the purchased supplies, it is provided in Article 8 (R. 10) that title "shall pass directly from the vendor to the Government without vesting in the Contractor." See also Article 7 (i) to the same effect. (R. 10.)

The distinction between Government-purchased equipment and equipment supplied by the contractor on its own behalf assumes a realistic importance in view of the provisions of the contract relating to rental compensation for equipment owned and supplied by the contractor. For such equipment the contractor may obtain rental compensation based upon cost, under the provisions of Article 7, *supra,* pp. 7, 38. (R. 9.) Includible in cost are insurance premiums, if allowable, depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 9.) Although the contractor is entitled to be compensated for costs relating to equipment supplied by it, it cannot, of course, obtain similar compensation with respect to Government-furnished equipment. In this connection it may be noted that although insurance premiums may be includible in computing rental compensation on contractor-supplied equipment (R. 9), the contractor is specifically requested not to insure Government-furnished equipment (R. 15). With respect to such equipment the Government assumes the risk of loss or damage. (R. 15.)

Here, again, it is plain that the present contract differs in all essential respects from that before the Court in *King & Boozer,* and these differences are important because the Court noted that the

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proval for purchases not in excess of $2,500. (Art. 8 (c), R. 10.)

"soundness" of the Government's contention that it was the purchaser "turns on the terms of the contract and the rights and obligations of the parties under it" (314 U. S. 1, 9):

(1) In the *King & Boozer* case, the contractor was to furnish as principal all supplies not furnished by the Government; the contract contemplated that the contractor was to obligate itself for purchases; and purchases were to be made in its own name and were not to bind the Government. Contrary provisions were included in the present contract, and the contractor is to act only as "purchasing agent" on behalf of the Government, which alone is bound to pay.

(2) In the earlier case, title could vest for some time in the contractor, before the United States accepted the purchased property. Here, the cost-plus contract specifically provides that the contractor shall never have title.

(c) *The course of business.*—The course of business followed in this case[18] was designed to implement the dual objectives of the purchasing provisions of the contract: to affirmatively pledge the credit of the Government to the vendor, and to utilize the skills and capabilities of the contractor in effecting procurement.

The request for the equipment was initiated by an employee of the contractor upon a form provided him by the Navy Department for that purpose.[19] (R. 38–39.) This form, after review by employees of the contractor, was transmitted to the Navy Technical Division, T–100, where it

[18] This is fully described in the Statement, *supra*, pp. 13–16.

[19] The form is designated "Purchase Request" (Navy Docs FC–201).

was checked to determine the necessity for the purchase, and the conformance of the items requested to required specifications. The request could have been denied at this point.[20] (R. 39.) However, the Navy Technical Division approved, and the words "Approval for Purchase" were noted upon the purchase request by the Navy Officer-in-Charge of Construction. (R. 39.) Thereupon, the contractor prepared a request for bids on a Navy Department form provided for that purpose,[21] and mailed the forms to a suitable list of possible vendors, including Kern-Limerick, Inc. (R. 40.) Recited upon the face of the request for bids was (R. 46A): "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered." One of the conditions was condition 3, quoted above (*supra*, p. 14), and already discussed in connection with the purchase order (*supra*, pp. 32–33).

When the forms were filled in and returned by the prospective vendors, they were opened by and read in the presence of representatives of the contractor and two representatives of the United States, and initialed by both the Government and contractor representatives. (R. 40.) These representatives recommended that the contract be awarded to Kern-Limerick, Inc., as the lowest acceptable bidder. (R. 40.)

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[20] The stipulation states (R. 39): "This Division [i. e., the Navy Technical Division] does in fact on occasion determine a request to be unnecessary and returns it."

[21] This form is designated "Request for Bids" (Form FC–202 (Y & D)).

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The purchase order contract was then prepared on a form supplied by the Navy Department,[22] which recited as a condition of purchase the same condition number 3 quoted above at p. 14. (R. 2B.) The purchase order was then signed by the contractor as "Purchasing Agent" for the United States (R. 2A), and sent to the Navy Officer-in-Charge who approved it and signed on behalf of the Contracting Officer (the Chief of the Bureau of Yards and Docks, Navy Department) (R. 2A). Next, the contract was transmitted to the Navy Technical Division which checked and approved it as conforming with the request for bids and other pertinent documents. (R. 41.) It was then forwarded to the Navy Auditing Division for checking. At that time, appropriated federal funds had to be and were available for the payment of the purchase price. Had such funds not been available the purchase order would not have been forwarded to Kern-Limerick, Inc. (R. 41.) The contractor (WHMS) would not proceed until federal funds were appropriated and set aside for the purchase.

After being again returned to the Officer-in-Charge for his final approval or disapproval, the purchase order was mailed by the contractor to Kern-Limerick, Inc., which until that time was not aware that it had been the low bidder. (R. 42.)

Kern-Limerick, Inc., shipped the tractors to the Navy Officer-in-Charge, in care of the contractor, Shumaker, Arkansas (R. 42), where they were received, inspected, and approved by a rep-

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[22] This form is designated "Purchase Order" (NavDocks FC–204).

resentative of the United States and a representative of the contractor, both being required to be present. (R. 42.) Receipt of the equipment was noted upon a Navy Department form.[23] (R. 42.) Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of condition number 3 quoted above, *supra*, p. 14. (R. 44.) The contractor paid it and was reimbursed by the United States. (R. 44–45.)

This procedure is consistent in every respect with the cost-plus contract, and illustrates clearly the practical construction placed by the parties upon its terms. It was plainly contemplated that the United States and not the contractor was to purchase, and that the contractor's function under the contract was merely that of an agent to solicit orders and to perform administrative tasks such as preparing necessary forms, receiving invoices, and advancing payment. The agreement and approval of the United States were necessary, and were obtained, at every significant stage in this course of business followed in effectuating the purchase from Kern-Limerick, Inc. In particular, the purchase was not consummated until federal funds, appropriated to the Navy by Congress, were available and were set aside for this purchase; there could be no clearer proof that it was the credit of the United States, and not of WHMS, that was being pledged. Nor was the participation of the Government officials perfunctory; the established course of business provided for detailed scrutiny by them, with final power of approval or disapproval.

[23] The form was designated "Receiving and Inspection Report" (NavDocks FC–205).

The relationship of the parties, as shown by this course of business, is fundamentally different from that existing in *King & Boozer*. The references we have already given to the situation in that case (*supra*, pp. 32, 33–6, 37, 40) suffice to show that the contractor there was not, and was not supposed to be, the agent of the United States; it did not, and could not, pledge the credit of the United States, nor obligate the Government to pay the vendor, and it did not seek to do so.

The *King & Boozer* decision indisputably pivots on the very factors in which the present case differs. The thread binding the entire opinion, and by which taxability was marked, was that the contractor and not the Government was bound for the purchase price. (314 U. S. 1, 10, 12, 13, 14.) The contractor and not the Government was the purchaser, and, therefore, the state tax was not levied on a federal transaction. The situation is reversed in this case; the Government and not the contractor is the purchaser and the impact is therefore squarely on the Government.[24] Each of the factors mentioned by the Court as showing that the contractor was the purchaser is different in this case. In these circumstances the rationale of *King & Boozer* points directly to a result opposite to that reached there, and contrary to that reached by the court below. The ruling below cannot be accepted without jettisoning all the reasoning of this Court in the earlier case.

B. There is no room for the argument that the decision of the Arkansas Supreme Court that the

[24] The dissenting opinion below (R. 56–57) tabulates the major differences between the situation presented in *King & Boozer* and that now before the Court.

contractor, and not the United States, is the purchaser is a decision on a matter of state law, which is binding on this Court. In the first place, the Supreme Court did not purport to be applying state law but the decision of this Court in *King & Boozer* (*supra,* p. 30) (R. 52); the court also declared that it had in mind "all the provisions of the contract between WHMS and the United States"—clearly a federal matter. The opinion of the majority of the court below plainly turns, not on previously decided Arkansas cases or on other sources of Arkansas law,[25] but on purely federal matters.[26] In these circumstances, where a state court has decided a case on federal grounds, this Court is free to examine those grounds even though the decision below might have been rested on an adequate state ground if the state court had so desired. *Alabama* v. *King & Boozer,* and its companion, *Curry* v. *United States,* 314 U. S. 14, are themselves illustrations of this principle. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483, is another federal immunity case in which a state court decision, formally resting on a provision of the state statute, was actually based on federal matters and was therefore reviewable here.

In any event, a ruling by the court below that, as a matter of state law, the United States was

[25] No Arkansas cases are cited in the opinion.

[26] There is not the slightest indication in the opinion, for instance, that the Arkansas Supreme Court would disagree with the assumption of this Court, in *King & Boozer*, that the purchaser of tangible goods "is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit." (314 U. S. at 10.)

not the purchaser would not be conclusive here. It is true that in *King & Boozer* (314 U. S. at 9–10) the Court remarked: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." But this was meant to encompass only the general standards to be used in defining the status of purchaser, as well as the facts and legal issues which are otherwise within the exclusive competence of the state court. Where the Federal Government and a federal contract are involved, other principles necessarily come into play. Though the authority to supply meaning to terms used in a state statute lies solely within the province of the state court, that court cannot conclusively determine whether a contract to which the United States is a party creates relationships which fall within the scope of those terms, as defined by the state court. That is a federal question upon which this Court is the final arbiter. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483; *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558; *Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; see *United States* v. *Allegheny County,* 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. Furthermore, in deciding issues of federal immunity from state taxation, this Court has always held itself free to decide for itself the real incidence, nature, operation, and impact of the tax. See *supra,* p. 25. And, also, if the state discriminates against the United States or its contractor by applying a different rule from that which would be appli-

cable if another person were involved (*e. g.,* by applying a different standard for determining who is the "purchaser"), this Court will grant relief. Cf. *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, 500–501.

## IV

THE PURCHASE BY THE GOVERNMENT FROM KERN-LIMERICK, INC., COMPLIED WITH THE REQUIREMENTS OF THE ARMED SERVICES PROCUREMENT ACT OF 1947

1. Article 40 of the contract between the United States and WHMS (R. 32) specifies that it is made under the authority of Sections 2 (c) (10) and 4 (b) of the Armed Services Procurement Act of 1947 (Appendix, *infra,* pp. 62–3, 66–7). The same statement appears in the stipulation of facts entered into by the parties and filed with the Chancery Court of Pulaski County, Arkansas. (R. 38.)[27]

The Act is expressly made applicable "to all purchases and contracts for supplies or services made by * * * the Department of the Navy * * * (* * * being hereafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds." Section 2 (a), Appendix, *infra,* p. 62.

It provides that, except in certain specified circumstances, all contracts and purchases be made by advertising. Section 2 (c), Appendix, *infra,*

[27] The suggestion by the Arkansas Supreme Court (R. 55) that the contract was negotiated pursuant to Section 2 (c) (12)–(16) of the Act (Appendix, *infra,* pp. 64–5) is completely unsupported by the record.

p. 62. Among the exceptions are contracts "for supplies or services for which it is impracticable to secure competition." Section 2 (c) (10), Appendix, *infra,* p. 63. In that case the agency head is authorized to negotiate the necessary contracts without advertising. Section 2 (c). As just noted, it was under the authority of this exception that the contract here involved was negotiated. Sixteen other exceptions are also listed in the Act. Section 2 (c) (1)–(9), (11)–(17), Appendix, *infra,* pp. 63–5.

Section 7 (a) of the Act (Appendix, *infra,* p. 67) authorizes the agency head to delegate his powers, including that of making necessary determinations and decisions, in his discretion and subject to his direction, to any other officer or official of the agency. When made, the necessary determinations and decisions are final. Certain restrictions are placed on the agency head's authority to delegate his powers, but none of the restrictions relate to determinations or decisions necessary in contracts negotiated pursuant to Section 2 (c) (10), the section under the authority of which the contract between the Government and WHMS was negotiated. All the restrictions on the agency's head's power to delegate relate to contracts negotiated pursuant to one of the other sixteen situations in which advertising may be dispensed with. Section 2 (c).

Negotiated contracts (i. e., contracts not made by advertising) "may be of any type which in the opinion of the agency head will promote the best interest of the Government", except for certain specified restrictions on the use of cost-plus con-

tracts. Section 4 (a), Appendix, *infra*, p. 65. The relevant restrictions on the use of the cost-plus-fixed-fee contracts are that the contractor's fee not exceed 10 per centum of the estimated cost of the contract, and that this form of contract not be used "unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without [its] use * * *." Section 4 (b), *infra*, pp. 66–7.

Summarized, the portions of the Act relevant to this case provide (a) that purchases and contracts for supplies and services for which it is impracticable to secure competition may be negotiated by the agency head without advertising; (b) that such contracts may be of any type which in the opinion of the agency head will promote the best interests of the Government; (c) that the agency head may delegate his powers, including that of making necessary decisions and determinations, to any other officer of the agency; and (d) that, when made, the necessary determinations and decisions of the agency head or his delegate are final.

2. Despite the holding of the court below on this point (R. 54–56), it is clear that all of the requirements of the Procurement Act have been complied with in the present case. The WHMS contract was entered into on behalf of the Government by the Chief of the Bureau of Yards and Docks, Department of the Navy, in his capacity of Contracting Officer. (R. 4–5.) It was not necessary for the Secretary of the Navy to approve the contract personally; it was negotiated by authority of Section 2 (c) (10) of the Act (R. 32),

and the Secretary's powers could therefore be delegated to an agency official. Delegation to the Contracting Officer is evidenced by the Joint Regulations of the Armed Services which authorize Contracting Officers and their negotiators to negotiate those contracts for which advertising is not required. 32 Code of Federal Regulations (1949 ed.), Sec. 402.101.

Article 40 of the contract recites that "any required determination and findings * * * have been made." (R. 32.) The validity of the making of the cost-plus contract itself is, therefore, beyond question.

Specific authority was not necessary to appoint WHMS purchasing agent to the limited extent that it was. Subject to restrictions not here applicable, the Armed Services Procurement Act of 1947 authorized contracts "of any type which in the opinion of the agency head will promote the best interest of the Government." Section 4 (a). This provision adopts the general rule that, absent Congressional restriction, the Government, as an incident to the general right of sovereignty, may enter into any contract appropriate to the exercise of its powers (*Van Brocklin* v. *State of Tennessee,* 117 U. S. 151; *United States* v. *Hodson,* 10 Wall. 395; *Neilson* v. *Lagow,* 12 How. 98; *United States* v. *Linn,* 15 Pet. 290; *United States* v. *Tingey,* 5 Pet. 115), and, like a private individual, may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Atkin* v. *Kansas,* 191 U. S. 207; *Ellis* v. *United States,* 206 U. S. 246; *Heim* v. *McCall,* 239 U. S. 175; Cf. *Fed. Trade Commission* v. *Raymond Co.,* 263 U. S. 565. Here, no

Congressional restriction has been violated and the Contracting Officer (as delegate of the agency head) has duly determined that the Government's interests would be promoted by making WHMS the Government's purchasing agent.

Nor was there any violation of the Procurement Act in the particular transaction with Kern-Limerick, Inc., which is here in issue. The power of the Secretary of the Navy to enter into contracts was exercised in this instance by the duly authorized Contracting Officer, acting (by subdelegation) through the Navy Officer-in-Charge, who signed the Purchase Order (*supra*, pp. 15, 35). The contractor (WHMS) complemented this purchasing arrangement by soliciting orders, administering the necessary papers, and advancing payment.[28] Acting in this capacity, its status as purchasing agent did not infringe upon the Contracting Officer's statutory authority. The detailed control exercised by the Government over the contractor's activities assured that none occurred, and the chain of authority was in full conformance with the requisites of the Procurement Act for Navy contracts.

3. In any event, neither appellee nor the State of Arkansas has standing to challenge the validity of the cost-plus contract or the agreement with Kern-Limerick, Inc. Both purport to be valid Government contracts, and we see no occasion for permitting those, like respondent, who are not parties to these contracts to attack their legality.

[28] Use of private citizens to perform agency functions for the United States is not uncommon. See *Muschany* v. *United States*, 324 U. S. 49; *Johnson & Higgins* v. *United States*, 287 U. S. 459; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18.

To permit such attack would depart from "the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion * * *." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127. Certainly, appellee cannot challenge the discretionary determinations and findings which have been made by the appropriate Navy officers in entering into these contracts. See *Dalehite* v. *United States*, 346 U. S. 15, 34.

## CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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DECEMBER 1953.

## APPENDIX

1. 7 Arkansas Statutes Annotated (1947 Official ed.), Act 386 (Arkansas Gross Receipts Tax Act of 1941):

84–1902. *Definitions.*— * * *

* * * * *

(c) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. * * *

* * * * *

(e) Taxpayer: The term "taxpayer" means any person liable to remit a tax hereunder or to make a report for the purpose of claiming any exemption from payment of taxes levied by this act * * *.

* * * * *

(i) Consumer–User: The term "consumer" or "user" means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act * * *.

* * * * *

84–1903. *Two per cent tax levied.*— There is hereby levied an excise tax of two [2%] per centum upon the gross proceeds

or gross receipts derived from all sales to any person subsequent to the effective date of this act * * *, of the following:

(a) Tangible Personal Property.

* * * * *

(e) * * *

Sales of service and tangible personal property including materials, suplies and equipment made to contractors who use same in the performance of any contract are herby declared to be sales to consumers or users and not sales for resale. * * *

84–1904. *Exemptions from tax.*—There is hereby specifically exempted from the tax imposed by this act the following:

* * * * *

(g) Gross receipts or gross proceeds derived from sales to the United States Government.

* * * * *

84–1906. *Preparation and filing of verified returns and remitting the tax.*—The tax levied hereunder shall be due and payable on the first day of each month, except as herein provided, by any person liable for the payment of any tax due under this act * * *; and, for the purpose of ascertaining the amount of tax payable under this act, it shall be the duty of all taxpayers on or before the 15th day of August, 1941 to deliver to the Commissioner, upon forms prescribed and furnished by him, returns under oath, showing the gross receipts or gross proceeds derived from all sales taxable or nontaxable under this act during the preceding calendar month, and thereafter like returns shall be prepared and delivered to said Commissioner by all such taxpayers on or before the 15th day of

each month for the preceding calendar month. Such returns shall show such further information as the Commissioner may require to enable him to compute correctly and collect the tax herein levied.

In addition to the information required on returns, the Commissioner may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax levied herein. Such taxpayer shall compute and remit to the Commissioner the required tax due for the preceding calendar month, the remittance or remittances of the tax to accompany the returns herein required. * * *

84–1907. *Taxpayers to keep adequate records for tax determination—Examination of records—Arbitrary assessment—Record of sales for resales.*—It shall be the duty of every taxpayer required to make a return and pay any tax under this act * * * to keep and preserve suitable records of the gross receipts or gross proceeds of sales taxable and nontaxable under this act, including such books of account and such analyses of sales as may be necessary to determine the amount of the tax due hereunder and all invoices, credit memoranda, refund slips, and other records of goods, wares, merchandise, and other subjects of taxation under this act as will substantiate and prove the accuracy of such returns. All such records shall remain in Arkansas and be preserved for a period of three [3] years, and shall be open to examination at any time by the Commissioner. In the event that such records are kept outside of the State of Arkansas in the usual course of business they shall be produced within the State of Arkansas

upon proper demand by the Commissioner within a period of fifteen [15] days after receipt of such demand. In the event the taxpayer fails to maintain or preserve proper records as described in this section the Commissioner shall be empowered to arbitrarily assess, upon such information as is available to him, the amount of tax due by the taxpayer. The burden of proof of refuting such assessment as set up by the Commissioner shall be upon the taxpayer.

* * * * *

84–1908. *Collection of tax by persons furnishing taxable service—Tokens—Redemption of—Priority of tax claim.*— * * *

* * * * *

The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser.

In order to make such collections convenient the Commissioner of Revenues may in his discretion issue tokens in the denominations of one-tenth [1/10] of one cent and five-tenths [5/10] of one cent, in such quantity as the Commissioner deems necessary. Tax tokens shall not be accepted by the State in payment of taxes due. Tax tokens shall be redeemed at face value by the Commissioner, at Little Rock, Arkansas, and at such other points as he may designate.

The Commissioner may, in the alternative, in his discretion set up by regulation a bracket system of collecting the tax due hereunder. * * *

* * * * *

84–1909. *Tax return on basis of cash actually received.*—The tax imposed by this act * * * shall be in addition to any or all taxes except as otherwise provided herein.

Any person taxable under this act doing business wholly or partly on a credit basis may make application to the Commissioner of Revenues for permission to prepare his returns on the basis of cash actually received. Such application shall be granted by the Commissioner under such rules and regulations as he may prescribe. Any person making such application shall be taxable on all monies collected during the taxable period. * * *

* * * * *

84–1911. *Right of taxpayer to hearing—Appeals—Refunds—No injunctive relief.*—If the Commissioner, after examining the return of any taxpayer or upon the failure of any taxpayer to file a return, determines that the taxpayer is liable to the State for any taxes specified under this act * * *, he shall give such taxpayer notice of his intention to collect such assessment by issuing a certificate of indebtedness as hereinafter provided, or by any other legal means. Such taxpayer may, if he so desires and duly notifies the Commissioner in writing within twenty [20] days after receipt of such notice of intention, demand a hearing on the question of the issuance of such certificate of indebtedness. Thereupon the Commissioner shall set a time and place for hearing and shall give the taxpayer reasonable notice thereof. The taxpayer shall be entitled to appear before the Commissioner and be represented by consel [counsel] and present testimony and argument. After the hearing the Commissioner shall render his decision in writing and by order establish any deficiency or tax found by him to be due and payable. If any taxpayer is aggrieved

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by any decision of the Commissioner he shall be required to pay the amount of taxes, interest and/or penalties found due by the Commissioner and after the payment of such taxes, interest and/or penalties, he shall be permitted to appeal within a period of thirty [30] days after such decision to the Chancery Court of Pulaski County where the matter shall be tried *de novo.* An appeal shall also lie from the Pulaski Chancery Court to the Supreme Court of Arkansas as in other cases now provided by law.

In the event any taxpayer is found by such court or courts entitled to recover any sums paid pursuant to the orders of the Commissioner as hereinbefore provided, such sums shall be refunded to him from a fund to be created by the Commissioner out of monies collected under this act * * *, to be known as the "Special Gross Receipts Refund Account," to be maintained for such purposes, which account shall not exceed the sum of $10,000.00.

No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this act * * *.

* * * * *

84-1912. *Authority to file certificates of indebtedness—Effect as lien—Execution—Fees—Employment of attorneys.*—If the taxpayer fails to demand a hearing within the time allowed, after an assessment of the tax due the State and proper notice thereof as hereinbefore provided, or if the taxpayer shall fail to pay the tax assessed by the Commissioner after such a hearing and an order by the Commissioner establishing such tax, as hereinbefore provided, then the Commissioner may, as soon as

practicable thereafter, issue to the Circuit Clerk of any county of the State, a certificate certifying that the person therein named is indebted to the State for the tax established by the Commissioner to be due. The Circuit Clerk shall immediately enter upon the Circuit Court judgment docket the name of the delinquent taxpayer, the amount certified as being due, a short name of the tax, and the date of the entry upon the judgment docket. Such entry shall have the same force and effect as an entry on such judgment docket of a judgment rendered by the Circuit Court of such county, and shall constitute and be evidence of the State's lien upon the title to any interest in any real property of the taxpayer named in such certificate. The entry of such certificate as a judgment shall constitute, in addition to the force and effect above described, a lien also upon all personal property of the taxpayer named therein from the time of the entry of such certificate.

* * * * *

84–1913. *Permits requisite to engaging in business—Display—Surrender upon quitting business—Tax a lien upon sale of business—Expiration—Revocation.*—It shall be unlawful for any taxpayer to engage or transact business within this State unless a written permit or permits shall have been issued to him. Every such taxpayer desiring to engage in or conduct a business within this State shall file with the Commissioner of Revenues an application for a permit to conduct such business, setting forth such information as the Commissioner may require. The application shall be signed by the owner of the business

as a natural person, or, in the case of a corporation, by a legally constituted officer thereof. Any taxpayer who engages in business, subject to the provisions of this section without a permit or permits, or after a permit has been suspended, shall be subject to penalties as hereinafter provided.

* * * * *

All permits issued under the provisions of this act * * * shall expire at the time of cessation of business at the place or location of the business within the State. Whenever a holder of a permit fails to comply with any provision of this act, the Commissioner shall give notice to the taxpayer of an intention to revoke such permit. The taxpayer may, within ten [10] days after receipt of such notice of intention, apply to the Commissioner for a hearing in the same manner as provided for in section 10 [§ 84–1911] of this act. Such hearing shall be conducted at a time and place to be designated by the Commissioner and the taxpayer shall be entitled to introduce testimony and be represented by counsel, and the Commissioner shall determine at such hearing whether such taxpayer's permit should be revoked. The taxpayer shall be entitled, within thirty [30] days from the date of the order of the Commissioner revoking such permit, to appeal to the Chancery Court in his county where the action shall be tried *de novo,* and an appeal shall lie from such Chancery Court to the Supreme Court of Arkansas as in other cases provided by law.

In the event the taxpayer fails to apply for a hearing within ten [10] days after receipt of such notice of intention, the Com-

missioner may revoke such permit. Any said permit may be renewed upon the filing of proper returns and the payment of all taxes due under this act * * * and/or removal of any other cause or causes of revocation or suspension. * * *

* * * * *

84–1915. *Discount allowed taxpayer for prompt payment—Forfeiture of discount.*—At the time of transmitting the returns required under this act * * *, to the Commissioner, the taxpayer shall remit therewith to the Commissioner, except as hereinafter provided, ninety-eight [98%] per centum of the tax due under the applicable provisions of this act, and failure to remit such tax at the time of filing the return shall cause said tax to become delinquent; provided, however, in the event the payment of any tax due under the applicable provisions of this act * * * becomes delinquent for a period of five [5] days the taxpayer forfeits his claim to the two [2%] per centum discount and must remit to the Commissioner one hundred [100%] per centum of the amount of tax due plus any penalty and interest due. This discount is allowed the seller or taxpayer to remunerate him for keeping Sales Tax Records, filing reports, collecting the tax, and remitting it when due as required by this act * * *.

84–1916. *Administration of act.*—(a) The administration of this act * * * is vested in and shall be exercised by the Commissioner. The Commissioner shall promulgate rules and regulations, and prescribe forms for the proper enforcement of this act.

* * * * *

84–1919. *Penalty for doing business without permit.*—Any taxpayer who continues to do business after the effective date of this act without first obtaining a permit provided for in section 12 * * * of this act, or any taxpayer who shall continue to do business after the revocation or suspension of any such permit obtained pursuant to this act * * *, shall be guilty of a misdemeanor punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month, nor more than 6 months, or both such fine and imprisonment; each day of doing business in violation of this act shall constitute a separate offense, punishable accordingly. * * *

* * * * *

2. Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21:

SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress:

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test; *Provided*: That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the low-

est negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise required by law.

(41 U. S. C. 1946 ed., Supp. V, Sec. 151.)

* * * * *

SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract

upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee

contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(41 U. S. C. 1946 ed., Supp. V, Sec. 153.)

* * * * *

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer

responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c), except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

(41 U. S. C. 1946 ed., Supp. V, Sec. 156.)

* * * * *

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

(41 U. S. C. 1946 ed., Supp. V, Sec. 158.)

* * * * *

SEC. 10. In order to facilitate the procurement of supplies and services by each agency for others and the joint procure-

ment of supplies and services required by such agencies, subject to the limitations contained in section 7 of this Act, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency heads or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. Appropriations available to any such agency shall be available for obligation for procurement as provided for in such appropriations by any other agency through administrative allotments in such amount as may be authorized by the head of the allotting agency without transfer of funds on the books of the Treasury Department. Disbursing officers of the allotting agency may make disbursements chargeable to such allotments upon vouchers certified by officers or civilian employees of the procuring agency.

41 U. S. C. 1946 ed., Supp. V, Sec. 159.)

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